

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE NATHANIEL COUSINS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S (ZOOM) :

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
VANESSA BAEHR-JONES
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S (ZOOM): (CONT'D)3
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FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
BY: LANCE A. WADE
AMY MASON SAHARIA
PATRICK LOOBY
725 TWELFTH STREET, N.W.
WASHINGTON, D.C. 200059
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LAW OFFICE OF JOHN D. CLINE
BY: JOHN D. CLINE
ONE EMBARCADERO CENTER, SUITE 500
SAN FRANCISCO, CALIFORNIA 94111

1 SAN JOSE, CALIFORNIA DECEMBER 18, 2020
2 P R O C E E D I N G S
11:05AM 3 (COURT CONVENED AT 11:05 A.M.)
11:05AM 4 THE CLERK: CALLING CRIMINAL 18-0258, UNITED STATES
11:05AM 5 VERSUS ELIZABETH HOLMES.
11:05AM 6 BEGINNING WITH GOVERNMENT COUNSEL, PLEASE STATE YOUR NAME
11:05AM 7 FOR THE RECORD.
11:05AM 8 MR. BOSTIC: JOHN BOSTIC FOR THE UNITED STATES.
11:05AM 9 MR. LEACH: GOOD MORNING, YOUR HONOR.
11:05AM 10 ROBERT LEACH FOR THE UNITED STATES.
11:05AM 11 THE COURT: GOOD MORNING.
11:05AM 12 MR. WADE: GOOD MORNING, YOUR HONOR.
11:05AM 13 LANCE WADE ON BEHALF OF ELIZABETH HOLMES. WITH ME THIS
11:05AM 14 MORNING OUT THERE ARE MY COLLEAGUES, AMY SAHARIA AND
11:05AM 15 PATRICK LOOBY.
11:05AM 16 MS. HOLMES IS ALSO PRESENT. I RECOGNIZE HER ON THE
11:05AM 17 SCREEN. SO THE COURT IS AWARE, WE HAVE SET UP A MECHANISM BY
11:05AM 18 WHICH WE ARE ABLE TO COMMUNICATE WITH HER IF NEED BE, AND IF
11:05AM 19 THAT BECOMES NECESSARY, I WILL ADVISE THE COURT OF THAT AND
11:05AM 20 SEEK THE COURT'S INDULGENCE FOR A BRIEF RECESS, OTHERWISE SHE
11:06AM 21 CONSENTS TO PROCEEDING IN THIS MANNER.
11:06AM 22 THE COURT: THANK YOU, MR. WADE. GOOD MORNING,
11:06AM 23 MS. HOLMES.
11:06AM 24 AND ON THE ISSUE OF COMMUNICATION, YES, IF AT ANY POINT
11:06AM 25 YOU WOULD LIKE TO PAUSE SO YOU CAN HAVE A CONFIDENTIAL

11:06AM 1 COMMUNICATION WITH YOUR CLIENT OR CONVERSELY IF SHE WOULD LIKE
11:06AM 2 TO HAVE A CONFIDENTIAL COMMUNICATION WITH YOU, PLEASE BRING IT
11:06AM 3 TO MY ATTENTION, AND WE WILL PAUSE FOR THAT PURPOSE.

11:06AM 4 WE ARE PROCEEDING REMOTELY BECAUSE OF THE PANDEMIC, AND
11:06AM 5 THANK YOU FOR HAVING CONSENTED TO OUR PROCEDURES FOR THAT
11:06AM 6 REASON.

11:06AM 7 WE ARE MAKING A RECORDING OF THIS MORNING'S HEARING. A
11:06AM 8 REMINDER FOR THOSE WHO ARE OBSERVING THE HEARING THAT NO
11:06AM 9 BROADCAST, TRANSMISSION, OR ANY LIVE TRANSMISSION OF OUR
11:06AM 10 HEARING IS PERMITTED. THE PARTIES MAY USE THE TRANSCRIPT, OF
11:06AM 11 COURSE, FOR THEIR PURPOSES IN THE CASE.

11:06AM 12 AND THIS HEARING IS ON A REFERRAL FROM JUDGE DAVILA, THE
11:07AM 13 TRIAL JUDGE. BOTH PARTIES MAY OBJECT TO MY RULING ON THE ORDER
11:07AM 14 ON THE EVIDENTIARY ISSUES AND MUST DO SO WITHIN 14 DAYS OF MY
11:07AM 15 RULING BACK TO JUDGE DAVILA.

11:07AM 16 THAT'S OUR PROCEDURAL POSTURE TODAY.

11:07AM 17 OF COURSE WE'RE HERE ON THE GOVERNMENT'S MOTION ON AN
11:07AM 18 EVIDENTIARY ISSUE ARISING FROM ASSERTED PRIVILEGES OF
11:07AM 19 MS. HOLMES. I'VE RECEIVED OPPOSITION AND REPLY BRIEF IN
11:07AM 20 PREPARATION FOR THE HEARING TODAY.

11:07AM 21 MR. BOSTIC, I'LL START WITH YOU IF YOU'RE THE ONE TO
11:07AM 22 ADDRESS THE ISSUES FOR THE GOVERNMENT. GIVE ME A LITTLE BIT OF
11:07AM 23 PRECISION AS TO WHAT YOU'RE SEEKING. THERE ARE 13 EXHIBITS,
11:07AM 24 TRIAL EXHIBITS IDENTIFIED IN THE PAPERS BETWEEN THE PARTIES,
11:07AM 25 BUT SOME LOFTIER WORDS IN THE MOTION ABOUT WHETHER -- WHAT

11:07AM 1 YOU'RE SEEKING IS SOMETHING BROADER THAN JUST THOSE TRIAL
11:08AM 2 EXHIBITS, IF YOU'RE WANTING AN ORDER THAT, FOR EXAMPLE, GOES TO
11:08AM 3 ALL BOISE SCHILLER REPRESENTATIONS AND COMMUNICATIONS OR IF
11:08AM 4 THERE IS SOMEWHERE IN BETWEEN AS FAR AS WHAT YOU'RE ASKING ME
11:08AM 5 TO RULE.

11:08AM 6 AND, OF COURSE, THERE ARE ADDITIONAL MOTIONS IN LIMINE
11:08AM 7 DEALING WITH MANY OTHER ISSUES AT TRIAL, AND I KNOW THOSE FOR
11:08AM 8 CONTEXT, BUT THE PARTIES HERE HAVE MUCH MORE GRANULAR KNOWLEDGE
11:08AM 9 ABOUT THE PARTICULAR TRIAL EXHIBITS AND OTHER TESTIMONY THAT
11:08AM 10 YOU MIGHT USE AT TRIAL.

11:08AM 11 SO I THINK YOU'RE A LITTLE AHEAD OF ME AS TO YOUR -- AS TO
11:08AM 12 WHAT YOU KNOW.

11:08AM 13 BACK OUT A LITTLE BIT AND GIVE ME SOME CONTEXT FOR WHERE
11:08AM 14 THIS DISPUTE FITS IN WITH THE BIGGER PICTURE.

11:08AM 15 MR. BOSTIC: YES, YOUR HONOR. I'LL DO MY BEST. AND
11:08AM 16 PLEASE FOLLOW UP WITH ADDITIONAL QUESTIONS IF I DON'T ANSWER
11:08AM 17 THE COURT'S FULL QUESTION.

11:08AM 18 THIS DISPUTE HAS BEEN, I THINK, PERCOLATING FOR A WHILE
11:08AM 19 BETWEEN THE PARTIES. I THINK, AS THE COURT CAN INFER FROM THE
11:08AM 20 PARTIES' BRIEFING, AT VARIOUS TIMES THROUGHOUT THE LITIGATION
11:08AM 21 THE DEFENSE HAS ALSO RAISED THE SPECTER OF A POSSIBLE PRIVILEGE
11:09AM 22 OR AN ASSERTED PRIVILEGE BELONGING TO MS. HOLMES PERSONALLY IN
11:09AM 23 HER PERSONAL CAPACITY AS OPPOSED TO IN HER CAPACITY AS CEO OF
11:09AM 24 THERANOS AND A REPRESENTATIVE OF THE COMPANY.

11:09AM 25 THAT HAS COME UP IN CONNECTION WITH THE GOVERNMENT'S

11:09AM 1 EARLIER EFFORTS TO COLLECT DOCUMENTS FROM THERANOS ITSELF AS
11:09AM 2 THE COMPANY WAS SHUTTING DOWN. IT CAME UP LATER IN VARIOUS
11:09AM 3 INSTANCES WHERE PARTICULAR DOCUMENTS OF INTEREST WERE
11:09AM 4 IDENTIFIED BY THE GOVERNMENT, AND NOW IT HAS COME UP IN THE
11:09AM 5 CONTEXT OF THESE 13 DOCUMENTS THAT THE COURT REFERENCED THAT
11:09AM 6 ARE ON THE GOVERNMENT'S TRIAL EXHIBIT LIST AND ABOUT WHICH THE
11:09AM 7 DEFENSE ASSERTS THE OBJECTION THAT THEY ARE PRIVILEGED.

11:09AM 8 SO AS FAR AS THE SCOPE OF THE RELIEF SOUGHT IN THE
11:09AM 9 GOVERNMENT'S MOTION, I CAN CLARIFY THAT. THE GOVERNMENT IS
11:09AM 10 SEEKING A RULING ONLY AS TO THOSE 13 DOCUMENTS.

11:09AM 11 TO THE EXTENT THAT THE BRIEFING DISCUSSES THE GENERAL
11:09AM 12 ISSUE OUTSIDE OF THOSE 13 DOCUMENTS, IT'S TO GIVE THE COURT
11:09AM 13 THAT CONTEXT AND BECAUSE I THINK THE COURT'S RULING ON THOSE 13
11:10AM 14 DOCUMENTS WILL BE INSTRUCTIVE TO THE PARTIES ON OTHER MATERIALS
11:10AM 15 AND TOPICS.

11:10AM 16 THE COURT: AND THAT'S WHERE I MIGHT NEED SOME MORE
11:10AM 17 HELP TO ENSURE THAT -- TO THE EXTENT THAT I'M GIVING
11:10AM 18 INSTRUCTIONS OUTSIDE OF THOSE 13 DOCUMENTS, WHAT EXACTLY I'M
11:10AM 19 INSTRUCTING. FOR EXAMPLE, ARE THERE OTHER DOCUMENTS NOT BEFORE
11:10AM 20 ME THAT MY RULING MIGHT IMPACT THEIR ADMISSION AT TRIAL AND IS
11:10AM 21 THERE TESTIMONIAL EVIDENCE FROM WITNESSES WHERE THERE ALSO
11:10AM 22 MIGHT BE A PRIVILEGE ASSERTION MADE IN MY RULING AS TO
11:10AM 23 MS. HOLMES'S ABILITY TO RAISE THESE EVIDENTIARY PRIVILEGE
11:10AM 24 OBJECTIONS IS ALSO GOING TO IMPLICATE THOSE?

11:10AM 25 TELL ME MORE ABOUT THE CONSEQUENCE OF MY RULING ONE WAY OR

11:10AM 1 THE OTHER ON THIS MOTION.

11:10AM 2 MR. BOSTIC: SO, YOUR HONOR, I THINK IT DEPENDS ON
11:10AM 3 THE NATURE OF THE COURT'S RULING AND HOW THE COURT FRAMES THAT
11:10AM 4 RULING. AND IT'S HARD TO SAY SITTING HERE WHAT THE DOWNSTREAM
11:10AM 5 IMPLICATIONS MIGHT BE, BUT THERE MAY BE OTHER DOCUMENTS THAT
11:11AM 6 FIT INTO A SIMILAR CATEGORY. AGAIN, NONE OF THEM HAVE
11:11AM 7 CURRENTLY BEEN IDENTIFIED ON THE GOVERNMENT'S OR I BELIEVE THE
11:11AM 8 DEFENSE'S TRIAL EXHIBIT LIST, BUT TO THE EXTENT THAT ADDITIONAL
11:11AM 9 SIMILAR DOCUMENTS ARE ADDED IN THE FUTURE, THE PARTIES MAY RELY
11:11AM 10 ON OR REFERENCE THE COURT'S RULING AS INSTRUCTIVE AS TO HOW THE
11:11AM 11 COURT WOULD LIKELY RULE ON THOSE OTHER DOCUMENTS.

11:11AM 12 SIMILARLY, TO THE EXTENT THAT THE GOVERNMENT OR THE
11:11AM 13 DEFENSE SEEKS TO INTRODUCE TESTIMONY FROM DAVID BOIES OR FROM
11:11AM 14 ANOTHER LAWYER AT BOIES SCHILLER, THE COURT'S RULING ON THESE
11:11AM 15 SIMILAR DOCUMENTS MAY AGAIN BE INSTRUCTIVE, NOT DIRECTLY I
11:11AM 16 THINK DECIDING THE ISSUE, BUT MIGHT BE INSTRUCTIVE ON THE
11:11AM 17 QUESTION OF WHETHER THOSE TOPICS OR THAT TESTIMONY MIGHT
11:11AM 18 TRIGGER SOME KIND OF PRIVILEGE PROTECTIONS.

11:11AM 19 SO I THINK AS THE COURT CAN SEE FROM THE PARTIES'
11:11AM 20 BRIEFING, THERE'S A DISAGREEMENT HERE AS TO EVEN WHAT STANDARD
11:11AM 21 NEEDS TO APPLY IN THESE SORTS OF COMMUNICATIONS, AND I THINK
11:11AM 22 THE COURT'S GUIDANCE ONE WAY OR THE OTHER WILL BE VALUABLE TO
11:12AM 23 THE PARTIES, NOT JUST IN CONNECTION WITH THESE DOCUMENTS, BUT
11:12AM 24 IN GENERAL GOING FORWARD.

11:12AM 25 THE COURT: AND ARE THE WITNESSES OTHER THAN

11:12AM 1 MR. BOIES WHO I SHOULD BE FOCUSED ON IN MAKING THIS RULING?

11:12AM 2 MR. BOSTIC: BASED ON THE DEFENSE'S CURRENT

11:12AM 3 ASSERTIONS NONE COME TO MIND, YOUR HONOR. I'M NOT SURE WHETHER

11:12AM 4 THE DEFENSE'S THINKING ON THIS, THIS MATTER ALSO EXTENDS TO

11:12AM 5 IN-HOUSE ATTORNEYS WHOSE TESTIMONY THE GOVERNMENT MIGHT SEEK TO

11:12AM 6 PRESENT.

11:12AM 7 THE COURT: ALL RIGHT. THANK YOU.

11:12AM 8 LET ME GET MR. WADE'S PERSPECTIVE OR ANY OF HIS TEAMMATES

11:12AM 9 AS TO THE CONSEQUENCE OF THIS RULING JUST TO MAKE SURE THAT I

11:12AM 10 UNDERSTAND HOW THIS IS GOING TO IMPACT THE TRIAL AND BEFORE I

11:12AM 11 RULE.

11:12AM 12 MR. WADE: THANK YOU, YOUR HONOR.

11:12AM 13 AS YOUR HONOR WELL KNOWS, AN EVIDENTIARY PRIVILEGE DOES

11:12AM 14 NOT EXIST IN A VACUUM. IT'S NOT AN AMORPHOUS THING. IT

11:12AM 15 RELATES TO PARTICULAR COMMUNICATIONS BETWEEN AN ATTORNEY AND A

11:13AM 16 CLIENT.

11:13AM 17 WITH RESPECT TO THE COMMUNICATIONS THAT ARE AT ISSUE,

11:13AM 18 THESE 13 COMMUNICATIONS, THERE'S NUANCES TO SOME OF THE

11:13AM 19 COMMUNICATIONS, BUT I THINK IT'S BEYOND DISPUTE THAT THERE'S AN

11:13AM 20 ATTORNEY-CLIENT RELATIONSHIP WITH RESPECT TO THE BOIES SCHILLER

11:13AM 21 LAW FIRM AND OUR CLIENT IN MULTIPLE RESPECTS, BUT IT'S ALL BUT

11:13AM 22 CONCEDED AT THE BEGINNING OF THE RELEVANT TIME PERIOD AND AT

11:13AM 23 THE END OF THE RELEVANT TIME PERIOD BECAUSE -- AND OUR

11:13AM 24 ARGUMENT, TO BE CLEAR, IS THAT THAT CONTINUED THROUGHOUT AND IN

11:13AM 25 PARTICULAR CONTINUED WITH RESPECT TO THE 13 DOCUMENTS THAT ARE

11:13AM 1 AT ISSUE.

11:13AM 2 TO THE EXTENT THAT THE GOVERNMENT SEEKS TO ADVANCE SOME

11:13AM 3 OTHER ARGUMENT, THAT'S -- WE WELCOME THAT DISCUSSION, AND WE'RE

11:13AM 4 HAPPY TO GO THROUGH A PROCESS WHERE WE ENGAGE WITH THE

11:13AM 5 GOVERNMENT ON THAT.

11:13AM 6 I'D LIKE TO BE CLEAR HERE THAT THERE'S NOTHING NEFARIOUS

11:13AM 7 IN ANY WAY ABOUT A DEFENDANT ASSERTING HER RIGHTS WITH RESPECT

11:14AM 8 TO A PRIVILEGE. IN FACT, AS THE COURT AND THE GOVERNMENT

11:14AM 9 COUNSEL WELL KNOW, IF MS. HOLMES DID NOT ASSERT HER RIGHTS WITH

11:14AM 10 RESPECT TO PRIVILEGES, THEY WOULD BE WAIVED, AND THERE WOULD BE

11:14AM 11 CONSEQUENCES THAT WOULD FLOW FROM THAT.

11:14AM 12 SO GOVERNMENT COUNSEL IS CORRECT THAT WE HAVE, SINCE BEING

11:14AM 13 ENGAGED IN THIS MANNER, CONSISTENTLY ADVISED THE GOVERNMENT AS

11:14AM 14 TO MS. HOLMES'S POSITION WITH RESPECT TO ATTORNEY-CLIENT

11:14AM 15 PRIVILEGE RELATIONSHIPS, AND WE'VE DONE SO IN A GOOD FAITH WAY

11:14AM 16 BASED UPON THE INFORMATION THAT IS AVAILABLE TO US.

11:14AM 17 AS I NOTED IN THE BRIEFING, WE HAVE NOT SOUGHT TO APPLY

11:14AM 18 THAT PRIVILEGE TO EVERY LAW FIRM THE COMPANY ENGAGED, AND IT'S

11:14AM 19 SET FORTH IN OUR BRIEF, OUR REPLY BRIEF. THEY'VE ENGAGED MANY.

11:14AM 20 BUT THIS IS A UNIQUE RELATIONSHIP AND THE SCOPE AND THE

11:14AM 21 APPLICATION OF THE PRIVILEGE, UNFORTUNATELY, HAS TO BE DONE IN

11:14AM 22 A COMMUNICATION-BY-COMMUNICATION BASIS.

11:14AM 23 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

11:15AM 24 MR. WADE, STICKING WITH YOU. AS YOU NOTED THERE WAS AN

11:15AM 25 ATTORNEY-CLIENT RELATIONSHIP. THE QUESTION IS WHETHER IT WAS

11:15AM 1 AN INDIVIDUAL RELATIONSHIP OR IF IT WAS A CORPORATE
11:15AM 2 RELATIONSHIP OR BOTH, AND THEN TO FIGURE OUT THE TIMEFRAME FOR
11:15AM 3 EACH OF THOSE, AND THEN TO APPLY THAT TO INDIVIDUAL
11:15AM 4 COMMUNICATIONS.

11:15AM 5 SO FOCUSING ON THE ASSERTION THAT THERE'S AN INDIVIDUAL
11:15AM 6 ATTORNEY-CLIENT BASIS BETWEEN MS. HOLMES AND THE BOIES SCHILLER
11:15AM 7 FIRM. SUMMARIZE FOR ME WHAT THE BEST EVIDENCE IS THAT THE --
11:15AM 8 FROM THE BEGINNING THAT THEY HAD AN ATTORNEY-CLIENT PRIVILEGE
11:15AM 9 RELATIONSHIP THAT WAS AN INDIVIDUAL RATHER THAN A CORPORATE
11:15AM 10 BASIS.

11:15AM 11 MR. WADE: THANK YOU, YOUR HONOR.

11:15AM 12 THE COURT: YES.

11:15AM 13 MR. WADE: AT THE BEGINNING OF THAT RELATIONSHIP
11:15AM 14 WHEN BOIES SCHILLER WAS FIRST BROUGHT IN TO DO ANY WORK WITH
11:16AM 15 RESPECT TO THERANOS OR MS. HOLMES, IT WAS IN CONNECTION WITH
11:16AM 16 THE FUISZ LITIGATION IN WHICH IT JOINTLY REPRESENTED BOTH OUR
11:16AM 17 CLIENT, ELIZABETH HOLMES, AND THE COMPANY.

11:16AM 18 CONTRARY TO WHAT THE GOVERNMENT SUGGESTED IN THEIR
11:16AM 19 OPPOSITION BRIEF THAT WAS BECAUSE SHE WAS A PARTY IN INTEREST.
11:16AM 20 IT DIDN'T RELATE TO SOME PARTICULAR PATENT DOCUMENT OR
11:16AM 21 OTHERWISE. THERE ARE MANY OTHER INVENTORS TO THAT PATENT. SHE
11:16AM 22 WAS AN INDIVIDUAL CLIENT, SHE HAD INDIVIDUAL INTERESTS THAT
11:16AM 23 WERE COEXTENSIVE AND NOT IN CONFLICT WITH THE CORPORATION,
11:16AM 24 WHICH IS NOT SURPRISING. SHE WAS AN INVENTOR ON MANY OF THE
11:16AM 25 PATENTS. SHE WAS THE FOUNDER. SHE WAS THE CEO. SHE WAS A

11:16AM 1 CONTROLLING SHAREHOLDER.

11:16AM 2 SO THE FACT THAT THE INTERESTS ALIGNED IS NOT SURPRISING.

11:16AM 3 THAT REPRESENTATION CONTINUED FOR A NUMBER OF YEARS. IT

11:16AM 4 WAS CONCEDEDLY A JOINT REPRESENTATION. THE BOIES SCHILLER FIRM

11:16AM 5 APPEARED ON BEHALF OF MS. HOLMES IN THAT MATTER. THEY SIGNED

11:17AM 6 PLEADINGS ON BEHALF OF MS. HOLMES IN THAT MATTER AS PART OF A

11:17AM 7 JOINT REPRESENTATION, AND THEREAFTER THAT JOINT REPRESENTATION

11:17AM 8 CONTINUED. THAT MATTER INVOLVED A LOT OF INTELLECTUAL PROPERTY

11:17AM 9 MATTERS AND TRADE SECRET MATTERS.

11:17AM 10 AN OUTGROWTH OF THAT WAS A BROADER ASSESSMENT OF THE TRADE

11:17AM 11 SECRET AND INTELLECTUAL PROPERTY MATTERS IN WHICH THERANOS HELD

11:17AM 12 AN INTEREST AND MS. HOLMES HELD AN INTEREST, AND IT CONTINUED

11:17AM 13 THEREAFTER.

11:17AM 14 WE'VE SET FORTH A NUMBER OF, A NUMBER OF DIFFERENT

11:17AM 15 REPRESENTATIONS WITHIN OUR PLEADINGS BUT IT CONTINUED.

11:17AM 16 LET ME JUMP TO THE END. THE END OF THE REPRESENTATION IS

11:17AM 17 IN THE FALL OF 2016 WHEN, AGAIN, THEY WERE IN THE -- THE

11:17AM 18 COMPANY WAS IN THE MIDST OF A JOINT REPRESENTATION WITH

11:17AM 19 MS. HOLMES, WITH THE COMPANY, AND IT WAS ONLY WHEN THEY CEASED

11:18AM 20 BOTH REPRESENTATIONS THAT THE REPRESENTATION ENDED.

11:18AM 21 IN THAT PERIOD IN BETWEEN THERE WERE A NUMBER OF MATTERS

11:18AM 22 ON WHICH BOIES SCHILLER WAS PROVIDING ADVICE IN CONNECTION WITH

11:18AM 23 A JOINT REPRESENTATION WHERE INTERESTS WERE ALIGNED TO

11:18AM 24 MS. HOLMES, THEY WERE PROVIDING THAT ADVICE TO MS. HOLMES AND

11:18AM 25 TO THE COMPANY.

11:18AM 1 AND YOU DON'T HAVE TO TAKE MY WORD FOR IT, YOUR HONOR.

11:18AM 2 YOU CAN LOOK ON PAGE 3 OF OUR OPPOSITION THERE'S A STATEMENT

11:18AM 3 SMACK IN THE MIDDLE OF THIS, THESE REPRESENTATIONS WHERE THE

11:18AM 4 GENERAL COUNSEL OF THE COMPANY, HEATHER KING, AT THAT TIME ON

11:18AM 5 THE RECORD -- THERE'S A TRANSCRIPT OF IT IN A MEETING WITH

11:18AM 6 "THE WALL STREET JOURNAL" SAID TO "THE WALL STREET JOURNAL"

11:18AM 7 THAT DAVID BOIES WAS INTIMATELY INVOLVED WITH THE COMPANY AND

11:19AM 8 THAT HE HAD ADVISED ELIZABETH AND THE COMPANY ON AN ONGOING

11:19AM 9 BASIS.

11:19AM 10 NOW, MS. KING WAS WELL SITUATED TO HAVE THAT INFORMATION.

11:19AM 11 SHE WAS A FORMER BOIES SCHILLER PARTNER. SHE HAD WORKED FOR

11:19AM 12 THE COMPANY AND FOR MS. HOLMES BEFORE SHE BECAME THE GENERAL

11:19AM 13 COUNSEL, AND THEN SHE CONTINUED THEREAFTER.

11:19AM 14 SO IN THAT PERIOD IN BETWEEN THOSE TWO JOINT

11:19AM 15 REPRESENTATIONS, WE HAVE A CLEAR STATEMENT FROM THE GENERAL

11:19AM 16 COUNSEL OF THE COMPANY WITH CLOSE CONNECTION TO THE

11:19AM 17 BOIES SCHILLER FIRM AS TO JOINT REPRESENTATIONS.

11:19AM 18 THE COURT, QUOTE, "ADVISED ELIZABETH AND THE COMPANY,"

11:19AM 19 CLOSED QUOTE.

11:19AM 20 THE COURT: DID HER QUOTE INDICATE OR IS THERE SOME

11:19AM 21 CONTEXT TO INDICATE THAT IN REPRESENTING MS. HOLMES IT WAS IN

11:19AM 22 HER INDIVIDUAL CAPACITY AT THAT MOMENT AS COMPARED TO IN HER

11:19AM 23 ROLE AS THE CORPORATE REPRESENTATIVE?

11:20AM 24 MR. WADE: WELL, WE KNOW IT IS IN CONNECTION WITH

11:20AM 25 THE DECLARATION PROVIDED BY MS. HOLMES BECAUSE IN THIS VERY

11:20AM 1 PERIOD THE BOIES SCHILLER FIRM WAS CONSIDERING POTENTIAL LEGAL
11:20AM 2 ACTION AGAINST "THE WALL STREET JOURNAL" ON BEHALF OF
11:20AM 3 MS. HOLMES, AND THERE'S OTHER EVIDENCE THAT WE CAN SUBMIT IN
11:20AM 4 CONNECTION WITH THAT.

11:20AM 5 I PAUSE BRIEFLY TO NOTE FOR THE COURT, OBVIOUSLY WHEN
11:20AM 6 YOU'RE LITIGATING A PRIVILEGE ISSUE WITH YOUR ADVERSARY WITHIN
11:20AM 7 THE SAME PROCEEDING THERE ARE LIMITATIONS IN TERMS OF THE
11:20AM 8 AMOUNT OF CONTEXT AND INFORMATION THAT WE CAN PROVIDE TO
11:20AM 9 CLARIFY THE JOINT REPRESENTATION.

11:20AM 10 WE DON'T WANT TO WAIVE PRIVILEGE. BUT AS WE'VE NOTED IN
11:20AM 11 OUR BRIEF, TO THE EXTENT THAT THE COURT BELIEVES THAT NECESSARY
11:20AM 12 IN THIS MATTER, WE COULD SUBMIT THAT EX PARTE IN CAMERA SO THE
11:20AM 13 COURT CAN SEE THAT INFORMATION.

11:20AM 14 FOR EXAMPLE, WE CAN'T DESCRIBE OTHER PRIVILEGE
11:20AM 15 COMMUNICATIONS THAT MIGHT BEAR ON THESE QUESTIONS WITHOUT
11:20AM 16 WAIVING THE PRIVILEGE, AND OBVIOUSLY WE DON'T INTEND TO DO
11:21AM 17 THAT.

11:21AM 18 THE COURT: YES. YOU REFERENCE A FOOTNOTE IN YOUR
11:21AM 19 BRIEF SUGGESTING THAT THERE MIGHT BE SOME IN CAMERA REVIEW OF
11:21AM 20 SOME ADDITIONAL MATERIALS WITHOUT COMPELLING DISCLOSURE OF WHAT
11:21AM 21 YOU'RE GOING TO POTENTIALLY GOING TO SUBMIT.

11:21AM 22 CAN YOU GIVE ME A LITTLE MORE INFORMATION ABOUT THE VOLUME
11:21AM 23 OF WHAT YOU PLAN TO PROVIDE FOR IN CAMERA AND HOW THAT WOULD BE
11:21AM 24 HELPFUL TO THE COURT? IF YOU CAN GIVE ME A LITTLE MORE SHAPE
11:21AM 25 TO WHAT I MIGHT LOOK AT.

11:21AM 1 OF COURSE, MANY TIMES THE COURT RESOLVES ISSUES LIKE THIS
11:21AM 2 WITHOUT DOING IN CAMERA REVIEW, BUT IT CAN BE A WAY TO HELP
11:21AM 3 UNDERSTAND AND ASSESS THE PRIVILEGE.

11:21AM 4 SO TELL ME MORE ABOUT WHAT YOU WOULD PROVIDE IF I AGREED
11:21AM 5 TO IT.

11:21AM 6 MR. WADE: WELL, FOR ONE, WE CAN PROVIDE SOME OF THE
11:21AM 7 COMMUNICATIONS THAT ARE AT ISSUE AND NOT WAIVE THEM IF THE
11:21AM 8 COURT REQUESTED THEM TO BE SUBMITTED.

11:21AM 9 IT'S AMBIGUOUS, I THINK, IN THE NINTH CIRCUIT AS TO
11:21AM 10 WHETHER WE NEED DIRECTION FROM THE COURT TO SUBMIT THEM TO
11:22AM 11 PROTECT US FROM THE WAIVER OR WHETHER WE CAN DO THAT
11:22AM 12 VOLUNTARILY. SO WE DIDN'T WANT TO DO IT WITHOUT A DIRECTION
11:22AM 13 FROM THE COURT TO MAKE SURE WE DON'T WAIVE THE PRIVILEGE.

11:22AM 14 AS THE COURT CAN TELL, WE'RE CONSERVATIVE IN THAT REGARD.

11:22AM 15 BUT MORE GENERALLY, THERE ARE OTHER COMMUNICATIONS THAT
11:22AM 16 ARE PRIVILEGED THAT HAVE LANGUAGE THAT WE THINK, YOU KNOW,
11:22AM 17 CONFIRM OUR GENERAL ARGUMENT AND OUR FRAME.

11:22AM 18 PART OF THAT IS, YOUR HONOR, AND THE VOLUME TO THAT POINT,
11:22AM 19 YOUR HONOR, BECAUSE I KNOW SOMETIMES COURTS IN YOUR POSITION
11:22AM 20 GET STUCK WITH A LABORIOUS TASK.

11:22AM 21 FORTUNATELY, FOR ALL OF US WE'RE TALKING ABOUT 13
11:22AM 22 DOCUMENTS HERE, MANY OF THEM RELATE, FRANKLY, MANY OF THEM
11:22AM 23 RELATE TO THAT DISPUTE, POTENTIAL DISPUTE WITH "THE WALL STREET
11:22AM 24 JOURNAL," AND SO THAT'S THE VAST MAJORITY OF THE COMMUNICATIONS
11:22AM 25 ON HERE. AND THEN THERE ARE A COUPLE OF OTHERS.

11:22AM 1 IT WOULD NOT BE AN EXTENSIVE SUBMISSION, BUT WE THINK IT
11:22AM 2 WOULD BE HELPFUL TO THE COURT. AND WE THINK WHY IT'S
11:23AM 3 APPROPRIATE HERE, YOUR HONOR, IS THIS -- THE ASSESSMENT OF THE
11:23AM 4 JOINT PRIVILEGE IN THIS CONTEXT, WHEN YOU LOOK AT TELEGLOBE AND
11:23AM 5 YOU LOOK AT SOME OF THE OTHER CASES THAT TALK ABOUT THE JOINT
11:23AM 6 REPRESENTATION AND WHETHER THE JOINT REPRESENTATION CONTINUES,
11:23AM 7 IT'S CLEAR THAT CONTEXT MATTERS IN CONNECTION WITH THAT.
11:23AM 8 THIS IS NOT A BEVILL OR A GRAF CASE WHERE THE QUESTION IS
11:23AM 9 WAS THERE EVER AN ATTORNEY-CLIENT RELATIONSHIP WHERE THE
11:23AM 10 QUESTION IN THOSE CASES IS ABOUT THE FORMATION.
11:23AM 11 WE KNOW ABOUT THE FORMATION. THE FORMATION IS ESSENTIALLY
11:23AM 12 UNDISPUTED.
11:23AM 13 THE QUESTION IS THE SCOPE. AND IN CONNECTION WITH THAT
11:23AM 14 SCOPE AND WHETHER THE JOINT REPRESENTATION CEASED, THERE ARE
11:23AM 15 OTHER FACTORS THAT ARE TO BE CONSIDERED. SOME OF THOSE FACTORS
11:23AM 16 ARE HARD TO CONSIDER WITHOUT PROVIDING SOME PRIVILEGED
11:23AM 17 INFORMATION.
11:23AM 18 THE COURT: ALL RIGHT. LET ME PAUSE THERE,
11:23AM 19 MR. WADE, AND GIVE MR. BOSTIC A CHANCE TO ADDRESS TWO THINGS,
11:24AM 20 MR. BOSTIC, IN WHICHEVER ORDER YOU WANT. ONE IS THE PROCEDURAL
11:24AM 21 OPTION OF HAVING THE COURT RECEIVE IN CAMERA ADDITIONAL
11:24AM 22 MATERIALS FROM THE DEFENSE FOR ME TO REVIEW.
11:24AM 23 AND THEN SECONDLY IS YOUR VIEW ABOUT KIND OF IN RESPONSE
11:24AM 24 TO WHETHER THE PRIVILEGE IS INDIVIDUALLY HELD BY MS. HOLMES OR
11:24AM 25 JOINT IN RESPONSE TO WHAT MR. WADE HAS ARGUED.

11:24AM 1 MR. BOSTIC: THANK YOU, YOUR HONOR. I'LL START WITH

11:24AM 2 THE SECOND AND THEN MOVE TO THE FIRST IF THAT'S ALL RIGHT.

11:24AM 3 SO I THINK THAT WE NEED TO START WITH THE DEFAULT UNDER

11:24AM 4 THE LAW IN THESE SITUATIONS WHERE A CORPORATE OFFICER SPEAKS TO

11:24AM 5 LAWYERS HIRED BY THE COMPANY.

11:24AM 6 THE DEFAULT IS, UNDER THE NINTH CIRCUIT AND UNDER THE

11:24AM 7 THIRD CIRCUIT, THAT ANY PRIVILEGE THAT EXISTS AS TO A CORPORATE

11:24AM 8 OFFICER'S ROLE AND FUNCTIONS WITHIN A COMPANY BELONGS TO THE

11:24AM 9 CORPORATION AND NOT THE OFFICER.

11:24AM 10 SO BECAUSE THIS CAN BE A COMPLICATED SITUATION WHERE A

11:25AM 11 CORPORATE OFFICER SPEAKS TO COMPANY COUNSEL, IT CAN CREATE

11:25AM 12 CONFUSION ABOUT WHO THE CLIENT IS AND WHO THE PRIVILEGE BELONGS

11:25AM 13 TO. WE HAD THAT DEFAULT TEST OR THAT DEFAULT STANDARD AND THE

11:25AM 14 GRAF TEST IS VERY CLEAR IN LAYING OUT THE REQUIREMENTS FOR A

11:25AM 15 CORPORATE OFFICER TO CLAIM INDIVIDUAL PRIVILEGE OVER THAT KIND

11:25AM 16 OF COMMUNICATION.

11:25AM 17 AS THE COURT CAN SEE FROM THAT STANDARD, IT'S SET UP TO

11:25AM 18 MAKE IT CHALLENGING FOR THAT CORPORATE OFFICER TO MAKE THAT

11:25AM 19 SHOWING, THE SHOWING REQUIRED TO ASSERT THAT INDIVIDUAL

11:25AM 20 PRIVILEGE.

11:25AM 21 HERE THE DEFENSE WANTS TO IGNORE THAT STANDARD AND INSTEAD

11:25AM 22 RELY ON GENERAL CASE LAW ABOUT JOINT REPRESENTATIONS, BUT THOSE

11:25AM 23 CASES CITED BY THE DEFENSE ARE OF LIMITED USEFULNESS HERE

11:25AM 24 BECAUSE THEY DON'T MAKE ANY ATTEMPT TO NAVIGATE THIS

11:25AM 25 COMPLICATED SITUATION, THE CHALLENGING SITUATION OF WHEN A

11:25AM 1 CORPORATE OFFICER IS SPEAKING TO COMPANY COUNSEL, AND IT MIGHT
11:25AM 2 BE UNCLEAR WHETHER THAT CORPORATE OFFICER IS SPEAKING IN HIS OR
11:25AM 3 HER INDIVIDUAL CAPACITY OR SIMPLY AS A CORPORATE
11:26AM 4 REPRESENTATIVE.

11:26AM 5 AND I SAY THAT'S A CHALLENGING SITUATION. AT LEAST IT
11:26AM 6 WOULD BE A CHALLENGING SITUATION IF IT WEREN'T FOR THIS VERY
11:26AM 7 CLEAR GRAF TEST THAT LAYS OUT SIMPLE ELEMENTS THAT IS INCUMBENT
11:26AM 8 ON THAT CORPORATE OFFICER TO SATISFY.

11:26AM 9 SO I THINK IT'S IMPORTANT TO REMEMBER THE NINTH CIRCUIT IN
11:26AM 10 THE RUEHLE CASE TELLS US THAT THE PARTY ASSERTING THE PRIVILEGE
11:26AM 11 HAS THE BURDEN OF ESTABLISHING FIRST THE EXISTENCE OF THE
11:26AM 12 RELATIONSHIP AND THEN ALSO THE PRIVILEGED NATURE OF THE
11:26AM 13 COMMUNICATIONS.

11:26AM 14 SO I HEAR THE COURT ASKING ABOUT THE RELATIONSHIP ITSELF.
11:26AM 15 SO LET'S START THERE.

11:26AM 16 I THINK THE KEY FACTS HERE ARE THAT THE BOIES SCHILLER
11:26AM 17 FIRM, YES, REPRESENTED AND ADVISED THERANOS ON A VARIETY OF
11:26AM 18 MATTERS. THAT'S CLEAR. THAT'S NOT DISPUTED.

11:26AM 19 IT IS DISPUTED, THOUGH, THAT THERE WAS A CLEAR AND JOINT
11:26AM 20 REPRESENTATION HERE AT ANY TIME.

11:26AM 21 IN RESPONSE TO HER BURDEN OR IN HER ATTEMPT TO SATISFY HER
11:26AM 22 BURDEN, THE DEFENDANT HAS SUBMITTED SOME GENERALIZED STATEMENTS
11:27AM 23 ABOUT THAT RELATIONSHIP, BUT SHE DOESN'T CLAIM THAT SHE EVER
11:27AM 24 MADE IT CLEAR TO BOIES SCHILLER ON A SINGLE OCCASION THAT SHE
11:27AM 25 WAS SEEKING THE FIRM'S ADVICE IN HER INDIVIDUAL CAPACITY.

11:27AM 1 SHE NEVER CLAIMS THAT THE FIRM EXPRESSLY AGREED TO
11:27AM 2 REPRESENT HER IN HER INDIVIDUAL CAPACITY.

11:27AM 3 SHE NEVER CLAIMS THAT SHE ENTERED INTO AN INDIVIDUAL
11:27AM 4 RETAINER AGREEMENT WITH THE FIRM. IN FACT, DOESN'T REMEMBER
11:27AM 5 AND CAN'T PRODUCE ANY RETAINER AGREEMENT AT ALL. THAT FACTOR
11:27AM 6 IS RELEVANT TO THE NINTH CIRCUIT IN THE GRAF CASE.

11:27AM 7 THE DEFENDANT DOESN'T CLAIM TO HAVE EVER PAID A SINGLE
11:27AM 8 DOLLAR TO BOIES SCHILLER IN HER PERSONAL CAPACITY. THAT LEAVES
11:27AM 9 THE COURT I THINK TO REASONABLY ASSUME THAT THERANOS ITSELF
11:27AM 10 PAID FOR THIS REPRESENTATION. THAT FACTOR WAS ALSO RELEVANT IN
11:27AM 11 THE GRAF OPINION.

11:27AM 12 IT'S ALSO IMPORTANT NOT TO LOSE SIGHT OF THE FACT THAT THE
11:27AM 13 FIRM ITSELF INFORMS DEFENSE COUNSEL IN CONNECTION WITH THIS
11:27AM 14 CASE THAT ITS UNDERSTANDING WAS THAT IT NEVER REPRESENTED
11:27AM 15 HOLMES INDIVIDUALLY, AND THE GOVERNMENT HAS SUBMITTED THAT
11:27AM 16 COMMUNICATION TO THE COURT FOR THE COURT'S REVIEW. THAT IS
11:27AM 17 ARGUABLY DISPOSITIVE AS TO FACTOR NUMBER 3 IN GRAF REQUIRING
11:28AM 18 THAT THE LAWYER ACTUALLY AGREE TO REPRESENT THE INDIVIDUAL
11:28AM 19 DEFENDANT IN THAT PERSONAL CAPACITY.

11:28AM 20 ANY STATEMENT BY HEATHER KING COULD NOT CHANGE THOSE
11:28AM 21 FACTS. AND, IN FACT, IF THE COURT REVIEWS THAT LANGUAGE, THE
11:28AM 22 ACTUAL LANGUAGE OF MS. KING'S STATEMENT, I THINK THE COURT WILL
11:28AM 23 SEE THAT THAT'S NOT CLEARLY ASSERTING AN INDIVIDUAL
11:28AM 24 ATTORNEY-CLIENT RELATIONSHIP BETWEEN HOLMES AND BOIES SCHILLER.
11:28AM 25 BUT EVEN IF IT DID, THAT WOULDN'T MATTER HERE. HEATHER KING

11:28AM 1 WOULD BE OUTSIDE OF THAT RELATIONSHIP, AND IT WOULD HAVE NO
11:28AM 2 EFFECT ON HOLMES'S FAILURE TO SHOW THE ELEMENTS AND THE FACTORS
11:28AM 3 THAT I'VE JUST LISTED.

11:28AM 4 SIMILARLY, HOLMES'S SUBJECTIVE UNDERSTANDING DOESN'T
11:28AM 5 MATTER HERE. I THINK THE GOVERNMENT CITED THE CASE LAW SHOWING
11:28AM 6 THAT.

11:28AM 7 SO WE'RE LEFT WITH THE DEFENSE ASKING THE COURT TO ASSUME
11:28AM 8 OR INFER FROM SOME PLEADINGS WHERE BOIES SCHILLER SIGNED ON
11:28AM 9 BEHALF OF THERANOS AND HOLMES THAT THERE WAS A LONGSTANDING
11:29AM 10 JOINT REPRESENTATION THAT SPANNED A VARIETY OF MATTERS, BUT THE
11:29AM 11 EVIDENCE DOESN'T SHOW THAT.

11:29AM 12 AS TO THE FUISZ LITIGATION, THAT SUIT WAS BROUGHT BY THE
11:29AM 13 COMPANY, OF COURSE. HOLMES WAS ALSO A PLAINTIFF. IT APPEARS
11:29AM 14 THAT PATENT LAW MIGHT HAVE REQUIRED OR AT LEAST AUGURED IN
11:29AM 15 FAVOR OF JOINING HOLMES AS A COPLAINTIFF THERE.

11:29AM 16 I'LL ALSO NOTE THAT ACCORDING TO THAT COMPLAINT, HOLMES
11:29AM 17 HAD ASSIGNED SOME RIGHTS TO THE COMPANY. SO IT'S UNCLEAR THAT
11:29AM 18 SHE WOULD HAVE RECOVERED PERSONALLY IN THAT CASE.

11:29AM 19 ALL OF THIS JUST GOES TO THE POINT THAT TO THE EXTENT THAT
11:29AM 20 BOIES SCHILLER APPEARED FOR OR REPRESENTED HOLMES IN CONNECTION
11:29AM 21 WITH THAT LITIGATION, IT REALLY APPEARS THAT THAT
11:29AM 22 REPRESENTATION WAS INCIDENTAL TO ITS OVERALL REPRESENTATION OF
11:29AM 23 THE COMPANY.

11:29AM 24 SO IF THAT'S THE CASE, IT SHOULD NOT BE RELIED UPON AS A
11:29AM 25 SIGNAL OF THE BEGINNING OF A LONG-TERM JOINT REPRESENTATION

11:29AM 1 THAT --

11:29AM 2 THE COURT: MR. BOSTIC, SORRY FOR INTERRUPTING.

11:29AM 3 WHAT IS THE TEST FOR -- WHEN YOU SAY IT'S INCIDENTAL? HOW DO I

11:30AM 4 REACH THAT CONCLUSION? IS THERE SOME CASE LAW THAT SAYS HERE'S

11:30AM 5 HOW YOU TELL IF SOME REPRESENTATION IS INCIDENTAL OR NOT, OR IS

11:30AM 6 IT JUST A COMMON SENSE TEST?

11:30AM 7 MR. BOSTIC: I WOULD SAY IT'S A COMMON SENSE TEST,

11:30AM 8 YOUR HONOR. I DON'T HAVE A CASE TO CITE ON THAT. I THINK WHAT

11:30AM 9 WE'RE LEFT TO DO IS LOOK AT THE EVIDENCE THAT THE DEFENSE HAS

11:30AM 10 SUBMITTED. IT IS THE DEFENSE'S BURDEN. WE ARE LEFT TO LOOK AT

11:30AM 11 THAT AND I THINK INFER WHAT WE CAN.

11:30AM 12 BUT MY MAIN POINT IS THAT IT WOULD BE SEVERAL STEPS TOO

11:30AM 13 FAR TO INFER FROM WHAT THE DEFENSE HAS PUT IN FRONT OF THE

11:30AM 14 COURT THAT THIS WAS THE BEGINNING OF A FULL INDIVIDUAL OR JOINT

11:30AM 15 REPRESENTATION THAT INCLUDED ELIZABETH HOLMES IN HER PERSONAL

11:30AM 16 CAPACITY.

11:30AM 17 THE COURT: MR. WADE WILL MAKE THE ARGUMENTS ON HIS

11:30AM 18 CLIENT'S BEHALF, BUT SHE WAS A NAMED PARTY IN THAT LITIGATION

11:30AM 19 AND WAS ASSERTING INTELLECTUAL PROPERTY RIGHTS. IT APPEARS ON

11:30AM 20 A PERSONAL BASIS THEY WERE HER RIGHTS, AND THEY WERE RIGHTS

11:30AM 21 THAT THE COMPANY ALSO HELD, BUT THEY WERE RIGHTS THAT SHE WAS

11:30AM 22 ASSERTING IN THAT CASE AND THAT, YOU KNOW, AS TO YOUR ARGUMENT,

11:30AM 23 THAT WAS INCIDENTAL TO THE CASE.

11:31AM 24 YOU KNOW, I HEAR THE ARGUMENT ON THE OTHER SIDE WHICH IS,

11:31AM 25 NO, THAT WASN'T INCIDENTAL, THAT WAS A SUBSTANTIAL

11:31AM 1 REPRESENTATION OF HER INDIVIDUAL RIGHTS WHERE COUNSEL WAS
11:31AM 2 COMMUNICATING WITH HER ABOUT THAT.
11:31AM 3 ALL RIGHT.
11:31AM 4 IF YOU CAN -- I'LL CONSIDER YOUR ARGUMENTS. ADDRESS THE
11:31AM 5 ISSUE OF POTENTIAL IN CAMERA REVIEW AND THE PROS AND CONS TO
11:31AM 6 LOOKING AT THOSE MATERIALS.
11:31AM 7 MR. BOSTIC: YES, YOUR HONOR.
11:31AM 8 IF I COULD JUST VERY BRIEFLY ON THE COURT'S LAST POINT.
11:31AM 9 THE COURT ACTUALLY DOES NOT NEED TO DECIDE THE QUESTION OF
11:31AM 10 WHETHER THAT REPRESENTATION IN CONNECTION WITH THE FUISZ
11:31AM 11 LITIGATION WAS TRULY JOINT OR NOT, BECAUSE IN THIS CASE THE
11:31AM 12 COMMUNICATIONS AT ISSUE, THERE'S NO CLAIM BY THE DEFENSE THAT
11:31AM 13 THEY ACTUALLY RELATED TO THAT MATTER.
11:31AM 14 THE CASE LAW TELLS US THAT TO THE EXTENT THERE IS A JOINT
11:31AM 15 REPRESENTATION, IT IS MATTER SPECIFIC. IT CANNOT BE THE CASE
11:32AM 16 THAT A PAST JOINT REPRESENTATION, EVEN IF IT WOULD CREATE THAT
11:32AM 17 INDIVIDUAL ATTORNEY-CLIENT RELATIONSHIP, THE CASE LAW DOESN'T
11:32AM 18 SUPPORT THE IDEA THAT THAT WOULD THEN AUTOMATICALLY CREATE ALL
11:32AM 19 ADDITIONAL, OR SORRY, THAT THAT WOULD CONVERT FUTURE ADDITIONAL
11:32AM 20 ENGAGEMENTS INTO JOINT ONES THAT WOULD PRESERVE THAT
11:32AM 21 RELATIONSHIP.
11:32AM 22 I HAVE SOME ADDITIONAL POINTS TO MAKE ABOUT THE INDIVIDUAL
11:32AM 23 COMMUNICATIONS HERE, BUT FIRST LET ME ADDRESS THE COURT'S
11:32AM 24 QUESTION ABOUT ADDITIONAL SUBMISSION OF IN CAMERA MATERIALS.
11:32AM 25 THE CASE LAW IS CLEAR THAT THE DEFENSE HAS THE BURDEN TO

11:32AM 1 MAKE THE REQUIRED SHOWING. THAT BURDEN HAS BEEN SQUARELY WITH
11:32AM 2 THE DEFENSE THIS ENTIRE TIME.

11:32AM 3 THE GOVERNMENT'S POSITION IS THAT THE DEFENSE SHOULD HAVE
11:32AM 4 SUBMITTED ALL OF THE EVIDENCE THAT IT NEEDED TO MAKE THE
11:32AM 5 SHOWING BY THIS TIME. SO THE GOVERNMENT WOULD OBJECT TO
11:32AM 6 ADDITIONAL SUBMISSIONS AFTER THIS FACT. EVEN IF THE GOVERNMENT
11:32AM 7 IS NOT ENTITLED TO ACTUALLY SEE WHAT IS SUBMITTED IN CAMERA,
11:32AM 8 THE GOVERNMENT HAS A RIGHT, I THINK REASONABLY, TO HEAR THE
11:32AM 9 DEFENSE'S ARGUMENTS ABOUT THOSE SUBMISSIONS AND TO BE PART OF
11:32AM 10 THAT CONVERSATION.

11:33AM 11 THE COURT: ALL RIGHT. THANK YOU.

11:33AM 12 ON THE ISSUE OF IN CAMERA REVIEW, I DETERMINED IT WOULD BE
11:33AM 13 HELPFUL FOR MY EVALUATION OF THE PRIVILEGE AND THE SCOPE OF THE
11:33AM 14 PRIVILEGE TO REVIEW THOSE MATERIALS.

11:33AM 15 ONE OF THE FACTORS THE COURT CONSIDERS IN DOING THAT IS
11:33AM 16 THE VOLUME AND JUST THE ADMINISTRATIVE ASPECT OF WILL I BE ABLE
11:33AM 17 TO REVIEW IT IN A TIMELY WAY SO THAT IT WILL BE HELPFUL FOR ME
11:33AM 18 TO MAKE MY DECISION?

11:33AM 19 AND MR. WADE HAS PROFFERED THAT THE VOLUME WILL NOT BE
11:33AM 20 DISABLING AND WILL NOT CAUSE A DELAY IN THE CASE.

11:33AM 21 AND THE ADVANTAGE OF JUDGE DAVILA HAVING REFERRED THE
11:33AM 22 MATTER TO ME IS THAT THERE'S NOT A DANGER OF, YOU KNOW, OF
11:33AM 23 INFECTION OF THE TRIAL JUDGE WITH SOMETHING THAT IS PRIVILEGED
11:33AM 24 AND CONFIDENTIAL THAT WOULD CAUSE HIM TO BE UNFAIR IN HIS TRIAL
11:33AM 25 AND POTENTIAL SENTENCING OF THE CASE. I CAN LOOK AT THE

11:33AM 1 MATERIALS IN CAMERA WITHOUT CONCERN THAT THEY WILL IMPACT
11:33AM 2 JUDGE DAVILA'S RULINGS ONE WAY OR THE OTHER.
11:34AM 3 I DON'T FIND THE DEFENSE HAS WAIVED THIS ARGUMENT. THEY
11:34AM 4 RAISED IT IN THEIR BRIEF THAT THEY PROPOSED MY LOOKING AT IT,
11:34AM 5 AND I JUST WANTED TO GET MORE CONTEXT FOR THAT PROPOSAL BEFORE
11:34AM 6 ORDERING IT.
11:34AM 7 SO, MR. WADE, I DO GRANT YOU LEAVE TO PROVIDE THE
11:34AM 8 MATERIALS EX PARTE FOR IN CAMERA REVIEW. AND BY SUGGESTING
11:34AM 9 THAT THEY ARE EX PARTE MY -- MR. BALWANI, OF COURSE, IS A
11:34AM 10 CODEFENDANT IN THE CASE. HE'S NOT A PARTY TO THE ARGUMENTS
11:34AM 11 HERE ABOUT EVIDENTIARY PRIVILEGES, BUT MY SUGGESTION WOULD BE
11:34AM 12 IS THAT THIS IS COMING TO THE COURT AND NOT TO THE CODEFENDANT
11:34AM 13 OR NOT TO THE GOVERNMENT. I WON'T PROVIDE IT TO JUDGE DAVILA
11:34AM 14 WITHOUT ANY FURTHER COURT ORDER AND OPPORTUNITY TO RESPOND.
11:34AM 15 DO THOSE LIMITATIONS MAKE SENSE TO YOU?
11:34AM 16 MR. WADE: THAT MAKES SENSE, YOUR HONOR.
11:34AM 17 IF I MIGHT WHEN APPROPRIATE, I WILL ALSO RESPOND BRIEFLY
11:34AM 18 TO MR. BOSTIC'S ARGUMENT.
11:34AM 19 THE COURT: ALL RIGHT. FIRST TELL ME WHEN YOU'LL
11:35AM 20 GET THOSE MATERIALS TO ME.
11:35AM 21 MR. WADE: WHEN WOULD THE COURT LIKE THEM?
11:35AM 22 THE COURT: WHENEVER. AS SOON AS YOU CAN REASONABLY
11:35AM 23 GET THEM.
11:35AM 24 IF THEY'RE COMING ELECTRONICALLY, THEY CAN COME TO MY
11:35AM 25 COURTROOM DEPUTY, AND YOU CAN COMMUNICATE WITH HER AS TO

11:35AM 1 PROVIDING THEM.

11:35AM 2 IF THEY'RE COMING IN PAPER FORM, YOU CAN PROVIDE THEM TO

11:35AM 3 THE COURTHOUSE IN SAN JOSE, AND I'LL PICK THEM UP THERE.

11:35AM 4 MR. WADE: YOUR HONOR, MAYBE BOTH FOR CONVENIENCE

11:35AM 5 AND TO MAKE SURE THE RECORD IS CLEAR, WE WILL TRANSMIT THEM TO

11:35AM 6 CHAMBERS ELECTRONICALLY PERHAPS MORE QUICKLY AND THEN GET THEM

11:35AM 7 ON FILE IN A MORE FORMAL WAY WITH THE COURT SO THERE'S A RECORD

11:35AM 8 OF THE FILING IN THE DOCKET.

11:35AM 9 THE COURT: THAT SOUNDS GOOD.

11:35AM 10 IS FRIDAY DOABLE?

11:35AM 11 MR. WADE: COULD WE HAVE UNTIL MONDAY, YOUR HONOR?

11:35AM 12 THE COURT: SURE.

11:35AM 13 MR. WADE: THANK YOU.

11:35AM 14 THE COURT: SO WE'LL ANTICIPATE RECEIVING SOME IN

11:36AM 15 CAMERA MATERIALS BY MONDAY, THE 21ST. AND WE'LL DOCUMENT WHEN

11:36AM 16 WE RECEIVE THEM, AND SO THAT WILL BE IN THE RECORD.

11:36AM 17 ALL RIGHT. MR. WADE, YOU WANTED TO RESPOND FURTHER TO

11:36AM 18 MR. BOSTIC'S ARGUMENTS. GO AHEAD.

11:36AM 19 MR. WADE: I DID, YOUR HONOR. FIRST OF ALL, THERE'S

11:36AM 20 NO INCIDENTAL ATTORNEY-CLIENT PRIVILEGE, ATTORNEY-CLIENT

11:36AM 21 RELATIONSHIP.

11:36AM 22 AS A LAWYER I EITHER HAVE OBLIGATIONS TO A CLIENT OR I

11:36AM 23 DON'T. THERE'S NO SUCH THING IN THE LAW, THAT I'M AWARE OF, OF

11:36AM 24 AN INCIDENTAL ATTORNEY-CLIENT RELATIONSHIP.

11:36AM 25 MR. BOSTIC'S ARGUMENT SORT OF DEMONSTRATES THE FAILURES OF

11:36AM 1 GRAF IN THIS CASE BECAUSE MR. BOSTIC IS SUGGESTING THAT WE
11:36AM 2 SHOULD USE THE TEST SET FORTH IN GRAF TO DEFEAT WHAT WAS
11:36AM 3 CLEARLY A JOINT REPRESENTATION BECAUSE THERE IS NOT EVIDENCE TO
11:36AM 4 MEET THE GRAF STANDARD NECESSARILY IN CONNECTION WITH THE
11:36AM 5 MATTER IN WHICH MS. HOLMES WAS REPRESENTED IN LITIGATION WHERE
11:36AM 6 THEY SIGNED PLEADINGS, WHERE THINGS WERE SUBMITTED TO THE COURT
11:37AM 7 ON HER BEHALF, THEY ENTERED INTO AN APPEARANCE PURSUANT TO THE
11:37AM 8 NORTHERN DISTRICT OF CALIFORNIA RULES.
11:37AM 9 YOUR HONOR, THEY DID THAT IN A MANNER THAT WAS NOT JUST A
11:37AM 10 PATENT MATTER. THAT INVOLVED ALLEGED THEFT OF TRADE SECRETS
11:37AM 11 AND OTHER MATTERS THAT WERE MUCH BROADER THAN PATENT MATTERS.
11:37AM 12 SECONDLY, ON BEHALF OF, ON BEHALF OF MS. HOLMES, THE
11:37AM 13 BOIES SCHILLER FIRM IN A RELATED MATTER ACTUALLY FILED
11:37AM 14 LITIGATION AGAINST MCDERMOTT, WILL & EMERY IN A LEGAL
11:37AM 15 MALPRACTICE MATTER IN THE DISTRICT OF COLUMBIA. AGAIN, NOT A
11:37AM 16 PATENT MATTER. A MATTER THAT WAS AN OUTGROWTH OF THAT AND
11:37AM 17 REFLECTS THE NATURE OF THE JOINT RELATIONSHIP WHICH CONTINUED.
11:37AM 18 AND CONTRARY TO THE SUGGESTION OF COUNSEL, WE DON'T HAVE
11:37AM 19 TO LOOK JUST TO THOSE REPRESENTATIONS. YOU CAN LOOK TO THE
11:37AM 20 EXPLANATION PROVIDED BY MS. HOLMES IN HER DECLARATION.
11:37AM 21 ALTHOUGH WE WILL SUBMIT ADDITIONAL INFORMATION TO THE
11:38AM 22 COURT IN CAMERA. SHE SETS THE CONTEXT FOR THE ADVICE THAT WAS
11:38AM 23 PROVIDED IN DIFFERENT MATTERS. THAT ADVICE WAS PROVIDED IN
11:38AM 24 CONNECTION WITH AN ONGOING JOINT REPRESENTATION, AND SHE MAKES
11:38AM 25 CLEAR THAT THERE WAS NEVER ANY INDICATION AT ANY TIME FROM THE

11:38AM 1 START OF THE REPRESENTATION TO THE END THAT THE REPRESENTATION
11:38AM 2 WAS LIMITED IN ANY WAY.

11:38AM 3 AND IT WOULD BE UNFAIR TO TAKE A GRAF TEST WHICH IF YOU
11:38AM 4 LOOK AT THE FACTS OF GRAF, YOU'RE TALKING IN GRAF WHICH, YOU
11:38AM 5 KNOW, IT TOOK SEVERAL BITES AT THE APPLE FOR THE COURT TO EVEN
11:38AM 6 CONSIDER THE BEVILL TEST, THE NINTH CIRCUIT TO EVEN CONSIDER
11:38AM 7 THE BEVILL TEST.

11:38AM 8 BUT WHEN YOU LOOK AT GRAF, THE FACTS ARE SO FAR FROM THIS
11:38AM 9 CASE IS TO DEMONSTRATE THE BAD FIT TO THESE FACTS WHERE THERE
11:38AM 10 WAS A LONGSTANDING JOINT REPRESENTATION IN ADVANCE OF THE
11:38AM 11 COMMUNICATIONS THAT ARE AT ISSUE HERE. IN THAT CASE THE PERSON
11:39AM 12 WASN'T EVEN AN EMPLOYEE OF THE COMPANY.

11:39AM 13 SO WE SHOULDN'T SLAVISHLY ADHERE TO SOME MULTIFACTOR TEST
11:39AM 14 THAT IS SET FORTH IN THE NINTH CIRCUIT IF IT DOESN'T FIT TO THE
11:39AM 15 FACTS OF THE CASE.

11:39AM 16 HERE IT DOESN'T. WE HAVE A CLEAR BOOK ENDED JOINT
11:39AM 17 REPRESENTATIONS THAT ARE DEMONSTRATED BY MULTIPLE
11:39AM 18 REPRESENTATION IN CONNECTION WITH MULTIPLE LITIGATION MATTERS
11:39AM 19 AND THE LAW IS CLEAR, AS WE'VE CITED IN OUR BRIEF, THAT THAT
11:39AM 20 PRESUMPTIVELY -- THAT IS PRESUMPTIVE EVIDENCE ESTABLISHING AN
11:39AM 21 ATTORNEY-CLIENT RELATIONSHIP WITH RESPECT TO MS. HOLMES, IT'S A
11:39AM 22 JOINT REPRESENTATION, AND THEN WE NEED TO GO BACK TO TELEGLOBE
11:39AM 23 AND LOOK AT THE FACTORS SET FORTH IN TELEGLOBE WHICH MANY
11:39AM 24 DISTRICT COURTS IN THIS CIRCUIT HAVE CITED FAVORABLY AND A
11:40AM 25 COUPLE OF DISTRICT COURT OF CALIFORNIA CASES OR DISTRICT OF

11:40AM 1 ARIZONA CASES, AND I THINK THE NINTH CIRCUIT HAS CITED IT
11:40AM 2 FAVORABLY ONCE.

11:40AM 3 JOINT REPRESENTATION IS THE VEHICLE THROUGH WHICH TO
11:40AM 4 ASSESS THESE OTHER COMMUNICATIONS, AND AS IT RELATES TO THAT
11:40AM 5 WHOLE, IF YOU WILL, WHICH IS NOT -- WHICH COMES BETWEEN THE
11:40AM 6 TWO -- THE FORMAL LITIGATION MATTERS, WE HAVE MS. HOLMES'S
11:40AM 7 DECLARATION, WE HAVE MS. KING'S STATEMENT, WHICH CONFIRMS THAT
11:40AM 8 DECLARATION, AND THERE WILL BE OTHER EVIDENCE SUBMITTED TO THE
11:40AM 9 COURT.

11:40AM 10 THE COURT: THANK YOU, MR. WADE.

11:40AM 11 MR. BOSTIC, I'LL GIVE YOU YOUR FINAL WORD AT THIS STAGE OF
11:40AM 12 THE PROCEEDINGS.

11:40AM 13 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:40AM 14 SO I THINK UNDER TELEGLOBE ITSELF, THOUGH, WHICH BY THE
11:40AM 15 WAY CAUTIONS NOT TO OVERLY MECHANICALLY APPLY THE LABEL OF
11:40AM 16 JOINT REPRESENTATION, UNDER TELEGLOBE IT'S CLEAR THAT WHETHER A
11:41AM 17 REPRESENTATION EXISTS IS DETERMINED ON A MATTER-BY-MATTER
11:41AM 18 BASIS.

11:41AM 19 IT IS NOT THE CASE THAT BECAUSE A FIRM REPRESENTED AN
11:41AM 20 INDIVIDUAL ONCE THAT EVERY ADDITIONAL CONTACT BETWEEN THAT
11:41AM 21 INDIVIDUAL AND THAT FIRM BECOMES PART OF THAT SAME JOINT
11:41AM 22 REPRESENTATION.

11:41AM 23 IN FACT, IT'S CLEAR HERE THAT THE FUISZ LITIGATION ENDED
11:41AM 24 IN THE FIRST QUARTER OF 2014. THE TOY CLASS ACTION, WHICH IS
11:41AM 25 ALSO REFERENCED BY THE DEFENSE, DIDN'T BEGIN OR AT LEAST THE

11:41AM 1 DEFENSE DOESN'T SUBMIT ANYTHING I THINK BEFORE SEPTEMBER OF
11:41AM 2 2016, EXCEPT FOR ONE OF THE DOCUMENTS AT ISSUE HERE. ALL OF
11:41AM 3 THE DOCUMENTS THAT THE COURT IS CONSIDERING OCCURRED OR CAME TO
11:41AM 4 BE BETWEEN THOSE TWO DATES.

11:41AM 5 SO WHILE THE DEFENSE WANTS THE COURT TO FOCUS ON THAT
11:41AM 6 POSSIBLE JOINT REPRESENTATION AT THE BEGINNING OF THE TIME
11:41AM 7 PERIOD AND ANOTHER POSSIBLE JOINT REPRESENTATION AT THE END,
11:41AM 8 THOSE DON'T DIRECTLY BEAR ON THE COMMUNICATIONS ACTUALLY AT
11:41AM 9 ISSUE HERE.

11:41AM 10 AND IT IS INCUMBENT, THE BURDEN IS ON THE PARTY ASSERTING
11:42AM 11 NOT JUST TO ESTABLISH THE EXISTENCE OF THAT ATTORNEY-CLIENT
11:42AM 12 RELATIONSHIP, BUT ALSO TO ESTABLISH THAT THE PRIVILEGE APPLIES
11:42AM 13 TO THE COMMUNICATIONS AT ISSUE. THAT'S WHERE THE DEFENSE
11:42AM 14 REALLY RUNS INTO TROUBLE HERE.

11:42AM 15 BESIDES THE FACT THAT THESE COMMUNICATIONS OCCURRED
11:42AM 16 OUTSIDE THE TIME PERIODS COVERED BY THOSE ALLEGED JOINT
11:42AM 17 REPRESENTATIONS, WE CAN ALSO SEE JUST FROM THE DESCRIPTIONS IN
11:42AM 18 THE DEFENDANT'S PRIVILEGE LOG THAT THESE RELATE NOT TO MATTERS
11:42AM 19 AFFECTING HOLMES INDIVIDUALLY IN HER PERSONAL CAPACITY, BUT
11:42AM 20 MATTERS AFFECTING THE COMPANY, MATTERS THAT IMPLICATE HOLMES'S
11:42AM 21 RESPONSIBILITY AS CEO, AS CORPORATE REPRESENTATIVE.

11:42AM 22 THESE ARE THE KINDS OF COMMUNICATIONS THAT ANY CORPORATE
11:42AM 23 CEO WOULD BE HAVING WITH ANY COMPANY COUNSEL. THEY'RE NOT
11:42AM 24 UNIQUE TO HER. THEY'RE IN FRONT OF THE COURT NOW BECAUSE
11:42AM 25 THEY'RE ON THE GOVERNMENT'S EXHIBIT LIST, BUT OTHERWISE THERE'S

11:42AM 1 REALLY NOTHING SPECIAL ABOUT THEM.

11:42AM 2 THEY ARE THE SORT OF COMMUNICATIONS YOU WOULD EXPECT TO

11:43AM 3 SEE BETWEEN ANY COMPANY'S CEO AND COUNSEL.

11:43AM 4 LOOKING AT THE SPECIFIC TOPICS COVERED HERE, I THINK IT

11:43AM 5 JUST DRIVES THAT POINT HOME. FOR EXAMPLE, THE FIRST DOCUMENT

11:43AM 6 ON THEIR PRIVILEGE LOG SAYS IT RELATES TO ATTORNEY-CLIENT

11:43AM 7 COMMUNICATION REGARDING ATTORNEY BILLING ARRANGEMENTS IN

11:43AM 8 ANTICIPATION OF LITIGATION.

11:43AM 9 THESE WOULD HAVE BEEN BILLING ARRANGEMENT FOR A LITIGATION

11:43AM 10 OR REPRESENTATION WHERE THERANOS DID THE PAYMENT. SO TO THE

11:43AM 11 EXTENT THAT BOIES SCHILLER IS HAVING A CONVERSATION WITH HOLMES

11:43AM 12 ABOUT BILLING FOR THAT REPRESENTATION, HOW CAN IT BE ARGUED

11:43AM 13 THAT THAT CONVERSATION IS IN HER PERSONAL CAPACITY AS PART OF

11:43AM 14 HER INDIVIDUAL ATTORNEY-CLIENT RELATIONSHIP WHEN THE TOPIC IS

11:43AM 15 BILLING WHERE THE BILLS GO TO THE COMPANY, THE BILLS ARE PAID

11:43AM 16 BY THE COMPANY? THAT'S A CONVERSATION INVOLVING HER IN HER CEO

11:43AM 17 CORPORATE REPRESENTATIVE CAPACITY ONLY.

11:43AM 18 SIMILARLY, DOCUMENTS 2 AND 11 ON THAT LIST RELATE TO

11:44AM 19 COMMUNICATIONS WITH INVESTORS. HOLMES DID NOT HAVE A PERSONAL

11:44AM 20 INDIVIDUAL BUSINESS RELATIONSHIP WITH THE INVESTORS. THESE

11:44AM 21 PEOPLE WERE INVESTORS IN THERANOS, THE COMPANY.

11:44AM 22 TO THE EXTENT THAT THEY SIGNED INVESTOR AGREEMENTS, THOSE

11:44AM 23 AGREEMENTS WERE SIGNED WITH THE COMPANY AS THE OTHER PARTY.

11:44AM 24 THEY GAINED SHARES IN THE COMPANY IN CONNECTION WITH THEIR

11:44AM 25 INVESTMENTS.

11:44AM 1 SO TO THE EXTENT THAT HOLMES WAS HAVING CONTACT WITH THEM,
11:44AM 2 IT WAS AS A COMPANY REPRESENTATIVE. TO THE EXTENT THAT SHE WAS
11:44AM 3 GETTING LEGAL ADVICE, THAT WAS LEGAL ADVICE FOR THE COMPANY IN
11:44AM 4 CONNECTION WITH THAT ROLE AS CEO AND COMPANY SPOKESPERSON.

11:44AM 5 AGAIN, DOCUMENTS 4, 7, 8, AND 9, THOSE RELATE TO THE
11:44AM 6 REGULATORY APPROVAL PROCESS BASED ON THE DEFENSE'S PRIVILEGE
11:44AM 7 LOG. THESE WERE THERANOS'S REGULATORY SUBMISSIONS SEEKING
11:44AM 8 APPROVAL FOR COMPANY TECHNOLOGY AND COMPANY PROCESSES.

11:44AM 9 THIS IS NOT ELIZABETH HOLMES PERSONALLY. SHE WASN'T LAB
11:44AM 10 DIRECTOR, FOR EXAMPLE. SO THESE COMMUNICATIONS ON THEIR FACE,
11:44AM 11 EVEN JUST BASED ON THE PRIVILEGE LOG, RELATE NOT TO HOLMES'S
11:45AM 12 PERSONAL RIGHTS AND OBLIGATIONS SEPARATE FROM THE COMPANY, BUT
11:45AM 13 RELATE SOLELY TO HER ROLE AS CORPORATE CHIEF EXECUTIVE AND A
11:45AM 14 REPRESENTATIVE OF THE COMPANY.

11:45AM 15 AND THE CASE LAW MAKES IT CLEAR THAT IN THAT SITUATION THE
11:45AM 16 TEST IS NOT MET THAT THE INDIVIDUAL PRIVILEGE CANNOT BE
11:45AM 17 ASSERTED.

11:45AM 18 THE NEWPARENT CASE TELLS US THAT AN EMPLOYEE CAN ASSERT AN
11:45AM 19 INDIVIDUAL PRIVILEGE ONLY TO THE EXTENT THAT COMMUNICATIONS
11:45AM 20 REGARDING INDIVIDUAL ACTS AND LIABILITIES ARE SEGREGABLE FROM
11:45AM 21 DISCUSSIONS ABOUT THE CORPORATION.

11:45AM 22 THE DEFENSE HAS NOT EVEN ATTEMPTED TO MAKE THAT SHOWING
11:45AM 23 HERE AND THAT'S BECAUSE THEY CAN'T.

11:45AM 24 I'LL MAKE JUST ONE QUICK FINAL POINT, AND THAT'S THAT
11:45AM 25 ALIGNED INTERESTS ARE NOT ENOUGH HERE. THE FACT THAT HOLMES'S

11:45AM 1 INTEREST MAY HAVE BEEN ALIGNED WITH THE COMPANY, AND I SUSPECT
11:45AM 2 THAT THE COURT WILL SEE THAT IN WHAT THE DEFENSE PLANS TO
11:45AM 3 SUBMIT TO THE COURT, BUT THE FACT THAT HOLMES'S PERSONAL
11:46AM 4 FORTUNES MAY HAVE BEEN TIED WITH THE COMPANY IS NOT UNIQUE IN
11:46AM 5 THIS CASE. THAT'S TRUE FOR ANY COMPANY FOUNDER AND CEO.
11:46AM 6 FOR ANY COMPANY AND FOUNDER AND CEO, THEIR PAY WILL RISE
11:46AM 7 IF THEIR COMPANY DOES WELL. THEY MIGHT LOSE THEIR JOB IF THE
11:46AM 8 COMPANY DOES POORLY, THEIR REPUTATION IS TIED INTO THAT OF THE
11:46AM 9 COMPANY. SO ALIGNMENT OF INTEREST IS NOTHING UNIQUE HERE. IF
11:46AM 10 THAT WERE ENOUGH TO FORCE THE COURT TO INFER A JOINT
11:46AM 11 REPRESENTATION, THEN THERE WOULD BE A JOINT REPRESENTATION IN
11:46AM 12 NEARLY EVERY CASE AND THE GRAF CASE WOULD LOSE ALL MEANING.
11:46AM 13 SO I'M HAPPY TO RESPOND TO ANY ADDITIONAL QUESTIONS THAT
11:46AM 14 THE COURT MIGHT HAVE, BUT WITH THAT THE GOVERNMENT SUBMITS.
11:46AM 15 THE COURT: I DON'T HAVE ANY ADDITIONAL QUESTIONS
11:46AM 16 NOW. I THANK BOTH PARTIES FOR YOUR PREPARATION.
11:46AM 17 I WILL DEFER RULING UNTIL I'VE HAD AN OPPORTUNITY TO
11:46AM 18 REVIEW THE IN CAMERA SUBMISSION FROM THE DEFENSE, AND IF I DO
11:46AM 19 GENERATE ANY ADDITIONAL QUESTIONS, I DON'T ANTICIPATE A NEED
11:46AM 20 FOR A FURTHER HEARING, BUT IF I REVIEW THOSE AND HAVE SOME
11:47AM 21 QUESTIONS, EITHER FACTUAL OR LEGAL TO POSE TO THE PARTIES, THEN
11:47AM 22 I WILL RE-NOTICE IT FOR A FURTHER HEARING.
11:47AM 23 I SEE, MR. WADE, MAYBE HAS ONE MORE THING TO ADD TO THE
11:47AM 24 RECORD. GO AHEAD.
11:47AM 25 MR. WADE: YOUR HONOR, I WAS HOPING TO BRIEFLY

11:47AM 1 REPLY. MR. BOSTIC RAISED SEVERAL NEW POINTS THAT HADN'T BEEN
11:47AM 2 ADDRESSED. WITHOUT EXPANDING THE SCOPE OF THE ARGUMENT, IF I
11:47AM 3 MIGHT TAKE 20 SECONDS AND REPLY TO THOSE POINTS?

11:47AM 4 THE COURT: NOTHING TAKES 20 SECONDS. BUT GO AHEAD,
11:47AM 5 MR. WADE.

11:47AM 6 MR. WADE: I'LL DO MY BEST. AGAIN, THE ARGUMENT
11:47AM 7 ABOUT THE APPLICATION OF BEVILL DEMONSTRATES WHY IT DOESN'T
11:47AM 8 WORK HERE. BECAUSE IF YOU APPLY BEVILL AND THE FIVE FACTORS,
11:47AM 9 THE FIFTH FACTOR, WHICH SAYS THAT THE INTERESTS HAVE TO BE
11:47AM 10 DISTINCT FROM THE CORPORATION WOULD MEAN THAT AN OFFICER IN A
11:47AM 11 CORPORATION COULD NEVER HAVE A JOINT REPRESENTATION, AND WE
11:47AM 12 KNOW THAT'S NOT THE CASE. IT WASN'T THE CASE HERE IN THREE
11:47AM 13 MATTERS, AND IT'S NOT THE CASE THROUGHOUT COURTS IN THIS LAND.
11:47AM 14 THAT'S WHY BEVILL DOESN'T MAKE SENSE IN THE CONTEXT OF A JOINT
11:48AM 15 REPRESENTATION. POINT ONE.

11:48AM 16 POINT TWO. WHY SOME OF THE COURTS, GRAF IN PARTICULAR,
11:48AM 17 TALKS ABOUT THE PAYMENT OF LEGAL FEES, THAT WAS MORE OF AN
11:48AM 18 ISSUE IN GRAF BECAUSE GRAF INVOLVED AN INDEPENDENT CONTRACTOR
11:48AM 19 WHO WAS MAKING AN ARGUMENT THAT HE HAD SOME SEPARATE
11:48AM 20 INDEPENDENT RELATIONSHIP WITH THE VERY SAME ATTORNEY, AND
11:48AM 21 THAT'S WHY THERE'S SO MUCH DISCUSSION IN GRAF.

11:48AM 22 AS WE KNOW, YOUR HONOR, CORPORATIONS ROUTINELY INDEMNIFY
11:48AM 23 INDIVIDUAL OFFICERS FOR -- IN CONNECTION WITH JOINT
11:48AM 24 REPRESENTATIONS AND IN CONNECTION WITH LEGAL WORK DONE ON
11:48AM 25 BEHALF OF THE INDIVIDUAL OFFICER IN CONNECTION WITH JOINT

11:48AM 1 REPRESENTATIONS, AND THAT'S EXACTLY WHAT HAPPENED HERE.

11:48AM 2 THERE'S AN INDEMNIFICATION AGREEMENT THAT OBLIGATED THERANOS TO

11:48AM 3 PAY LEGAL FEES FOR MS. HOLMES IN CONNECTION WITH JOINT

11:48AM 4 REPRESENTATION. SO THAT'S OF NO MOMENT FOR THIS CASE AND

11:48AM 5 SHOULD BE GIVEN LITTLE WEIGHT.

11:49AM 6 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. I

11:49AM 7 THINK THAT GIVES ME PLENTY TO WORK WITH.

11:49AM 8 THANK YOU AGAIN FOR YOUR PREPARATION ON BOTH SIDES. YOUR

11:49AM 9 BRIEFS WERE VERY HELPFUL.

11:49AM 10 WE WILL HAVE A WRITTEN ORDER, AND BOTH PARTIES WILL HAVE

11:49AM 11 AN OPPORTUNITY TO ASSESS THAT AND FILE ANY OBJECTIONS BACK TO

11:49AM 12 JUDGE DAVILA.

11:49AM 13 ALL RIGHT. HAPPY HOLIDAYS. WE'RE IN RECESS. THANKS

11:49AM 14 AGAIN.

11:49AM 15 MR. LEACH: THANK YOU, YOUR HONOR.

11:49AM 16 MR. WADE: HAPPY HOLIDAYS. THANK YOU, YOUR HONOR.

11:49AM 17 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:49AM 18 (COURT CONCLUDED AT 11:49 A.M.)

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3 CERTIFICATE OF REPORTER
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7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

14 
15

16

IRENE RODRIGUEZ, CSR, RMR, CRR
17 CERTIFICATE NUMBER 8074
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19 DATED: JANUARY 6, 2021
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